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employer from obtaining it. It is the manner in which the picketing is conducted, in those jurisdictions recognizing the legality of peaceable picketing, which determines its legality in each particular case. There are few standards which the courts have employed in determining whether the picketing has in fact been peaceable or intimidating. Thus, several courts have held that an injunction will be granted an employer where numerous third parties interfere with his employees against the latter's consent, and endeavor by unlawful means to induce them to quit.¹⁷ A Massachusetts case goes so far as to hold that the presence of two pickets at a factory entrance is intimidating, and may be relieved by an injunction.¹⁸

But, where the picketing is intended solely to affect prospective patrons and customers by causing them to trade elsewhere, by making it known to the general public that a strike is on against the employer for the reason that he is unfair to organized labor, and the conduct of the pickets is peaceable, a few courts hold such action on the part of the strikers to be permissible, and an injunction will not lie to prevent such action.¹⁹

P. M. P.

THE RULE OF TRIENNIAL COHABITATION.—The doctrine of triennial cohabitation, that is, that if there has been no sexual intercourse between married parties after an ostensible cohabitation as husband and wife for three years, the husband will be presumed impotent, and the burden will be upon him to overcome this presumption, is well settled in England.¹

In the case of *The Countess of Essex*,² decided in the year 1613, the law of triennial cohabitation was declared by the King's Delegates as follows:

"That *impotentia coeundi in viro* whatsoever, whether by natural defect, or accidental means, whether absolute towards all, or respective to his wife only, if it precede matrimony, and be perpetual (as by law is presumed, when after three years trial, after the man is of the age of eighteen, there has been *nil ad copulam*, and the marriage not consummated) is a just cause of divorce *a vinculo matrimonii*."

¹⁷ *Jersey Printing Co. v. Cassidy*, *supra*; *Goldfield Mines Co. v. Miners' Union*, 159 Fed. 500; *O'Neil v. Behanna*, 182 Pa. 236, 37 Atl. 843; *Jones v. Van Winkle Gin & Machine Works*, *supra*.

¹⁸ *Velegahn v. Guntner*, *supra*.

¹⁹ *Traux v. Bisbee Cooks' & Waiters' Union*, *supra*; *Webb v. Cooks' & Waiters' Union* (Tex.), 205 S. W. 465; *Justin Seubert, Inc. v. Reiff*, 164 N. Y. Supp. 522.

¹ *Lewis v. Hayward*, 35 L. J. (N. S.) P. & D. 105; *Welde v. Welde*, 2 Lee Ecc. 578; *C— v. C—*, 29 L. J. (N. S.) 81; *S— v. A—*, 3 Prob. Div. 72; *F— v. P—*, 75 L. T. 192; *S— v. E—*, 3 Swab. & Tr. 240; *G— v. S—*, 1 Spinks Ecc. 389; *A— v. B—*, 1 Spinks Ecc. 12.

² 2 How. St. Tr. 786.

Dr. Lushington explains the rule as not an absolute one, because the inference of impotency drawn from the nonconsummation of the marriage after three years of cohabitation is capable of being rebutted; nor does the rule exclude other evidence to show impotency before the lapse of three years.³ The rule merely raises a *prima facie* presumption of impotency after parties ostensibly married have cohabited for three years.⁴ But although the word "cohabit" is not taken to mean spending every night under the same roof, it has been held that where the parties have been necessarily separated a considerable part of the time, a further period of grace will be allowed.⁵ And in the case of *Sparrow v. Harrison*⁶ it was decided that a medical examination of the man was unnecessary, the examination of the woman, and her condition having been found *virgo intacta* being deemed sufficient where the parties had cohabited the required period of three years.

Although in the United States a marriage is held voidable where either party thereto is impotent, that is, incapable of free sexual intercourse,⁷ apparently the first American case to recognize and apply the doctrine of triennial cohabitation is *Tompkins v. Tompkins*,⁸ decided in August 1920. In that case the parties had cohabited for five years after marriage, at the end of which time the wife was still a virgin. She was granted an annulment of the marriage on the ground of incurable impotency of the husband, who was unable to overcome the presumption raised by the doctrine under discussion. In delivering the opinion of the court, Backes, V. C., said:

"There is no valid reason for not adopting it (the doctrine of triennial cohabitation) as a part of our common law, since the Legislature has added to the domestic relation jurisdiction of the Court of Chancery incurable impotency as a cause for annulment. While novel and an innovation in our practice, there is no reason why the rule should not have a place in our judicial system, there to subserve the administration

³ *Greenstreet v. Cumyns*, 2 Phill. 10; *Briggs v. Morgan*, 3 Phill. 325; *F— v. D—*, 4 Swab. & Tr. 86. In *G— v. S—*, 1 Spinks Ecc. 389, the wife was complainant after only three months cohabitation. The defendant was examined, and although no anatomical malformation was discovered, the medical inspectors were of the opinion that he was physiologically defective so as to prevent complete copulation, and they found that the defect would be permanent. Upon examination of the wife, they reported that there were no certain signs of virginity, but neither was there evidence of perfect connection having taken place. The court granted relief to the complainant.

⁴ *G— v. M—*, 10 App. Cas. 171.

⁵ *Welde v. Welde*, *supra*; 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, p. 497.

⁶ 3 Curteis Ecc. 16.

⁷ Anonymous, 89 Ala. 291, 7 L. R. A. 425, 18 Am. St. Rep. 116; *Chase v. Chase*, 55 Me. 21; *Smith v. Morehead*, 59 N. C. 360.

⁸ (N. J.), 111 Atl. 599.

of the law as it has for ages under a system which we inherited."

It is submitted that the New Jersey Court is to be highly commended for adopting into its law a doctrine so eminently sound as to have withstood the test of ages in the jurisprudence of our forefathers.

T. H. M.

HOSTILITY TO CESTUI QUE TRUST AS GROUNDS FOR REMOVAL OF TRUSTEE.—It is proposed here to examine the proposition that a court of equity will remove a trustee for hostility between him and the *cestui que trust*. To do this, it would seem logical to begin with a brief exposition of what, in this discussion, is meant by the term "hostility".

This term is used to signify a deep-seated personal hatred or distrust of the trustee by the beneficiary. A quarrel over some point, particularly one involving discretion or interpretation of an instrument, is not enough, for the purpose of the trust is often to substitute the judgment of the trustee for that of the *cestui que trust*.¹ A fair young beneficiary, viewing the rising price of gowns, and learning of friends grown rich overnight on oil stocks, or of "safe" investments yielding twenty per cent, might easily desire the removal of a trustee who derived but a meagre income of four per cent on safe mortgages that would never make her any richer. In such a case the court would commend the trustee and condemn the *cestui que trust*.² But suppose the trustee to be a gruff old uncle, intolerant of young girls meddling in business, arrogant on being questioned, disliking his niece and probably disapproving of her dancing, and loath to give such accounts or information as a court might from time to time require. A hatred and distrust engendered in the *cestui que trust* by years of such high-handed, but legal conduct would amount to hostility as that word is used here. However, the feeling need not be due entirely to the conduct of the trustee.³ The principal requirements are that the feeling should be of a permanent nature, not founded on a frivolous cause, nor due to a difference of opinion on a question involving discretion.

Having defined the cause for which it is proposed to remove the trustee, let us examine how this hostility affects the successful workings of a trust. There are a great variety of trusts, and in some friction will do more harm than in others. Therefore, it is desirable to make a rough classification of trusts into three types, according to the discretion vested in the trustee, and consider the damage hostility would do in each case.

First, let us look at "dry" trusts, which are those where the

¹ *Gibbes v. Smith*, 2 Rich. Eq. (S. C.) 131; *Clark v. Anderson*, 73 Ky. 99; *Forster v. Davies*, 4 DeG. F. & J. 133.

² *Gibbes v. Smith*, *supra*; *Clark v. Anderson*, *supra*.

³ *May v. May*, 167 U. S. 310, 41 L. R. A. 767.